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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DERRICK NORBERT MORRIS,

Plaintiff and Appellant,

v.

ALAMEDA HEALTH SYSTEM et al.,

Defendants and Respondents.

A151043, A151412

(Alameda County
Super. Ct. No. RG15768977)

In these consolidated appeals, Dr. Derrick Norbert Morris appeals judgments entered in favor of multiple defendants based, in part, on orders sustaining demurrers without leave to amend and, in part, on his failure to timely file a fourth amended complaint after demurrers to other causes of action in his third amended complaint were sustained with leave to amend. Plaintiff has appeared throughout in propria persona. The lengthy record reflects numerous attempts by the trial court to provide clarifying information to plaintiff as to defects that needed to be corrected in order to state a viable cause of action. Despite the severity of the injuries plaintiff alleges were caused by at least some of the defendants, the court ultimately correctly rejected some of his claims on the merits and dismissed the entire action when he failed to file a further amended complaint within the time provided after sustaining demurrers to his third amended complaint. We find no error and shall affirm the judgments.

Background

Plaintiff's appellate brief, far more succinctly than his pleadings in the trial court, summarizes the factual context of his claims as follows: "[Plaintiff] experienced severe

pain [in] his spinal cord on two occasions in March and April 2014. He visited Highland Hospital & Alta Bates Sutter Medical Center for diagnosis and treatment. On both occasions, he was misdiagnosed as having a heart attack; their tests were negative for a heart attack but his complaint was not investigated further. On May 25, 2014, he collapsed around 45[th] Street and Telegraph Avenue, Oakland, paralyzed from his breast. [¶] He was admitted to Alta Bates Summit Medical Center on or about May 25, 2014. The surgeon delayed the surgery to remove a blood clot from his spine. After he was stabilized he was transferred to Herrick Center in Berkeley, for physical [and] occupational therapies. At Herrick Center, he was offered seven days of intensive therapies. There the Center's medical doctor, neuropsychologist, and social worker worked as a team and kept him there for approximately 63 days. Dr. Shirley Chi (Dr. Chi) medical doctor, Dr. Nancy Canning (Dr. Canning) Neuropsychologist[, and] Ms. Leanne Leacock (Ms. Leacock) social worker, were asked by [plaintiff for permission] to leave [Herrick Center] on several occasions and invariabl[y] they refused to give him permission to leave. [¶] On August 4, 2014, at about 4 a.m., plaintiff escaped from [Herrick Center] to Oakland, CA. [Plaintiff] sued these defendants within the year for various torts.”

Plaintiff's original complaint was filed on May 4, 2015, alleging causes of action for medical malpractice and false imprisonment against Alameda Health System, Highland Hospital, Sutter Health, and Alta Bates Summit Medical Center (Alta Bates), based on the alleged failure to diagnose and treat the blood clot in his spine and on his hospitalization at the Herrick Rehabilitation Center (Herrick) from June 1 to August 4, 2014.

After the court sustained Alta Bates's demurrer to the false imprisonment cause of action with leave to amend, specifying the deficiencies in the pleading and corrections necessary to comply with the California Rules of Court, plaintiff filed his first amended complaint. This pleading alleged multiple causes of action against multiple defendants. As to Alameda Health System, the complaint alleged: “Plaintiff has not directed any cause of action against the public entity Alameda Health System. It is only included

herein as a respondeat superior for purposes of leveling damages. The true defendant in this case is Dr. Cherie Hargis to whom the causes of action are attached.” The amended complaint proceeded to allege separate causes of action against Dr. Hargis for “intentional medical malpractice,” “negligent medical malpractice,” “civil assault and battery,” “intentional infliction of emotional distress,” and “negligent infliction of emotional distress.” The amended complaint alleges five similar causes of action against Dr. James Starr, three separate causes of action against Dr. Gordon Tang and Alta Bates, two separate causes of action for intentional and negligent infliction of emotional distress against Mr. Sergio Perez, and four separate causes of action against Dr. Canning, Dr. Chi, and Ms. Leacock for false imprisonment, intentional and negligent infliction of emotional distress, and “intentional interference with plaintiff’s green card.” This final cause of action was based on the allegation that defendants kept him hospitalized and prevented him from attending “an interview with Immigration in San Francisco to adjust his immigration status and obtain his Green card.”

The court sustained several demurrers to the first amended complaint by the various defendants, with each order containing a thorough explanation of the court’s reasoning and the deficiencies in the pleading. Plaintiff was granted leave to amend, but each order stated, “Plaintiff is not permitted to allege any new causes of action. This order does not preclude plaintiff from later filing a noticed motion to amend his pleading to assert any additional meritorious claims he believes he may have.”

Plaintiff filed a second amended complaint which, though adding some allegations and deleting some causes of action, was much like the first amended complaint. Before the court ruled on the defendants’ demurrers and motions to strike, plaintiff filed a motion to amend to add claims; the court directed plaintiff to file a proposed third amended complaint and continued the hearing on the demurrers and motions to strike until after the proposed pleading had been filed. As of the hearing on August 18, 2016, plaintiff had dismissed Dr. Hargis from the action and for the first time named as a defendant in the proposed third amended complaint Dr. Kara Toles. Ultimately the court sustained the demurrers in large part with leave to amend and granted in part plaintiff’s

motion to amend but directed him to file a third amended complaint that differed in specified respects from his proposed third amended complaint.

Plaintiff filed and all defendants demurred to plaintiff's third amended complaint. On April 3, 2017, following a hearing, the court issued a series of orders sustaining demurrers to some causes of action with prejudice and some without prejudice with leave to amend within 10 days after service of notice of the rulings. Among the demurrers sustained without leave to amend were those directed to the false imprisonment, negligent infliction of emotional distress, and assault and battery causes of action against personnel at Herrick—Dr. Chi, Dr. Canning, Ms. Leacock, and Mr. Perez. The court also ordered a fourth amended complaint that plaintiff had filed on March 10 to be stricken “because it was filed without prior leave of court,” adding that plaintiff “has calendared a ‘motion to add causes of action’ for May 9, 2017, at which time the court will determine whether plaintiff should be given leave to further amend his pleading.” Notices and amended notices of most of these rulings were served by the various defendants between April 6 and April 13, 2017; one such notice was served on April 24. On April 10, 2017, plaintiff filed a notice of appeal from all of the April 3 orders.

On May 9, 2017, the court entered an order denying plaintiff's second “motion to add additional causes of action.” On May 11, all parties, including plaintiff, appeared before the court, and the court considered and granted ex parte applications by all defendants to dismiss the action based on plaintiff's failure to have filed a further amended complaint within the time period provided in the April 3 orders. Judgments of dismissal were thereafter entered. On May 18, plaintiff filed a notice of the appeal now before us.¹

¹ This appeal was consolidated with the appeal filed on April 10, 2017. As discussed below in text, the April 10 notice of appeal purported to be taken from nonappealable orders and thus must be dismissed.

On June 1, 2017, plaintiff filed in the trial court a “motion for enlargement of time to file amended complaint,” which the court denied on June 13, 2017.

Discussion

Plaintiff presents several arguments in support of his appeal—two challenging the propriety of the orders dismissing the action for failing to timely amend, and three challenging the orders dismissing certain causes of action without leave to amend.

1. *Dismissal for failure to timely amend*

As to the first contentions, the trial court properly dismissed plaintiff's action for failure to file an amended complaint within the time permitted by the court's orders sustaining demurrers to the third amended complaint with leave to amend. Code of Civil Procedure section 581, subdivision (f) provides: "The court may dismiss the complaint as to [a] defendant when: . . . (2) Except where Section 597 applies [which it does not], after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." Plaintiff contends that the order was "unconscionable" because the trial judge at one point may have suggested that such an order would be inappropriate. However, neither this argument nor plaintiff's contention that he was denied due process has merit. The order was entered at an ex parte hearing at which plaintiff was present. Moreover, the lengthy record reflects that the trial court gave plaintiff numerous opportunities to submit a proper pleading and wrote extended orders explaining the deficiencies in the pleadings that plaintiff had previously filed. There was no abuse of discretion in granting the dismissals because, among other factors, the court undoubtedly was of the justifiable view that plaintiff could not allege causes of action that would withstand demurrer. Indeed, Code of Civil Procedure section 430.41, subdivision (e)(1) provides "a complaint . . . shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action." Despite his efforts, plaintiff made no such showing here.

Plaintiff also contends that the notice of appeal that he filed on April 10 deprived the trial court of jurisdiction to enter the May 11 dismissals. However, the April 10 notice of appeal purported to appeal from the April 3 rulings on the various demurrers—plainly

non-appealable orders. (*Jeffers v. Screen Extras Guild, Inc.* (1951) 107 Cal.App.2d 253, 254; *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695.) An appeal from a non-appealable order does not deprive the trial court of jurisdiction. (*Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 124; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360; *Central Sav. Bank v. Lake* (1927) 201 Cal. 438, 442.)

2. *Sustaining without leave to amend certain causes of action*

Plaintiff also contends the trial court erred in sustaining without leave to amend demurrers to the causes of action for false imprisonment, assault and battery, and negligent infliction of emotional distress against the four defendants involved in his care at Herrick—Dr. Chi, Dr. Canning, Ms. Leacock, and Mr. Perez. Although the court did not rule on the basis of the statute of limitations, the rulings might well be sustained on that basis alone. As the court did rule in granting motions to strike plaintiff’s punitive damage allegations under Code of Civil Procedure section 425.13, “plaintiff’s claims arise from alleged negligent performance of health care services.” The court undoubtedly was correct that these claims are against health care providers based on one aspect or another of the health care services he received at the hospital or at Herrick. Therefore, under Code of Civil Procedure section 340.5, which applies to claims against health care providers for professional negligence, the claims were required to be filed within one year after plaintiff discovered or should have discovered his injury. While the date of discovery may well have been much earlier, it could not possibly be later than August 4, 2014, the date plaintiff alleges he “escaped” from Herrick. The claims against the four defendants in question were not filed until plaintiff filed his first amended complaint on October 15, 2015, well beyond one year after discovery.²

² Although plaintiff’s original complaint did include Doe allegations, plaintiff did not obtain leave to amend to substitute these defendants for the fictitiously named defendants, nor did he comply with the other requirements for application of the Code of Civil Procedure section 474 relationship-back doctrine. (See *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 175-177.)

In all events, the grounds relied on by the trial court also support its rulings. Plaintiff contends that the demurrers to his assault and battery causes of action were wrongly sustained, focusing in his appellate brief on his allegations directed against Dr. Shirley Chi and the occupational therapist, Sergio Perez.

As to Dr. Chi, the allegation in the third amended complaint, after numerous opportunities to amend, was that she and another doctor “were going to give [plaintiff] diuretics. They are medical doctors and were able to prescribe them for him to take. As a result of the diuretics plaintiff began to urinate more copiously and wet his bed because he was involuntarily urinating every three minutes or so. This necessitated the use of the indwelling catheters and intermittent catharizing. These were traumatic revelations and unnecessary procedures thus qualifying as civil assault and battery.”

The allegation against Perez in the third amended complaint was that “Perez too should be held liable for civil assault and battery. He should have known that his compelling plaintiff to rise up quickly from his bed was not right. However, as he ordered it plaintiff knew that he had [the] power to enforce his [*sic*]. This was inducing plaintiff to harm himself. So that his order to rise up without the precautionary measures, slow rise, binders, this was a threat of possible death. [¶] As plaintiff began to lose consciousness, he was reaching out and battered himself on the commode. His hand was waving around banging on the equipment. Thus he caused plaintiff to be battered. Due to his orders he is responsible for the ensuing battery.”

The court properly rejected the sufficiency of these allegations to state a cause of action for assault or battery, citing *Cobbs v. Grant* (1972) 8 Cal.3d 229, 240 for the proposition, “In the context of providing medical service, a battery claim is reserved for circumstances where a doctor performs an operation to which the patient has not consented.” (See also *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1496 [same].) Whether or not there may be other circumstances constituting a battery in a medical context (*Mayben v. Rankin* (1961) 55 Cal.2d 139, 144 [“the use of force in the treatment of the patient . . . may not constitute assault and battery in all circumstances”]), the facts on which plaintiff relies plainly do not. Neither defendant is alleged to have used force or

to have performed a procedure to which plaintiff did not consent. Dr. Chi prescribed a diuretic and Perez directed plaintiff to arise from bed to receive physical therapy. Defendants' alleged conduct might at most support a claim for medical malpractice or negligence, and the court sustained the demurrers to those causes of action with leave to amend.

The trial court also properly sustained demurrers by Drs. Chi and Canning and Ms. Leacock to the causes of action for false imprisonment at Herrick. As the court correctly explained, plaintiff "has not alleged any facts supporting a claim for false imprisonment against either Canning or Leacock. Rather, he alleges that they sought to extend his stay at the nursing facilities for an additional 30 days; that they told him he should only be discharged to an ADA approved home; that they told 'Immigration' that plaintiff was hospitalized and could not attend a meeting on June 15, 2014; and that they did not want to discharge him to a location in the Bay Area, but instead wanted to discharge him to 'another country or state.' " As to Dr. Chi, he alleged that "she told him he needed to buy a new wheelchair (that he could not afford) before he could be discharged from the care facility in which he was being treated" and that she also did not want him discharged to a Bay Area location.

Plaintiff analogizes these facts to those in *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, in which an employee being interrogated by her employer made "repeated requests to leave the room and to call her mother [which] were denied. She was physically compelled to remain in the room for more than one hour. At one point Fermino rose out of her chair and walked toward the door of the interrogation room in an attempt to leave; however, as soon as she made a move toward the door, one of the security guards slid in front of the door, threw up a hand and gestured her to stop." (*Id.* at p. 707.) Plaintiff argues that his situation was similar because he "was barred by not [being] allowed to go outside without a staff member, the wheel chair purchase and wait to be discharged to a foreign country or another state." But the facts are unmistakably dissimilar. Among other things, despite several opportunities to do so, plaintiff has not alleged that defendants by force or threats prevented him from leaving Herrick without a medical discharge.

Finally, the court denied without leave to amend the demurrers of several defendants to plaintiff's causes of action for "negligent infliction of emotional distress." Citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984, the court correctly held there is no independent tort of negligent infliction of emotional distress. The court pointed out that plaintiff's claim was encompassed within his claims for medical malpractice, as to which he was granted leave to amend. As to the alleged causes of action for negligent infliction of emotional distress against those defendants against whom plaintiff had not alleged malpractice claims, the court granted leave to amend to allege simple negligence claims. There was no error in this respect.

Disposition

The appeal in No. A151043 is dismissed. The judgments from which the appeal in No. A151412 are taken are affirmed.

POLLAK, P. J.

WE CONCUR:

STREETER, J.

TUCHER, J.